

A KENNY HEIGHTS DEVELOPMENT SDN BHD

v.

B PENTADBIR TANAH WILAYAH PERSEKUTUAN; SISTEM
PENYURAIAN TRAFIK KL BARAT SDN BHD (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[LAND REFERENCE NO: S3-15-03-01]
1 SEPTEMBER 2007

C **CIVIL PROCEDURE:** *Parties - Intervention - Application to intervene - Application based on existence of contractual obligation pursuant to a privatization agreement - Proposed intervener failed to prove existence of privatisation agreement - Whether intervener application to be allowed - Rules of the High Court 1980, O. 15 r. 6*

D **CONTRACT:** *Terms - Confidentiality clause - Whether prohibition to disclose is an absolute prohibition - Whether parties may by mutual agreement disclose agreement to a third party - Whether other party to agreement can unreasonably object to disclosure*

E **EVIDENCE:** *Best evidence rule - Document - Document to be produced in its entirety - Provision of agreement cannot be construed in isolation - Must be construed in context of agreement as a whole - Whether sufficient for parts of an agreement to be tendered as evidence in court*

F The State Authority of the Federal Territory of Kuala Lumpur acquired an area of land in the Federal Territory of Kuala Lumpur belonging to Kenny Heights to build the SPRINT Highway. The acquisition by the State Authority was made on behalf of Lembaga Lebuhraya Malaysia (LLM). An inquiry was held by the Land Administrator, and Kenny Heights, at the conclusion of the inquiry, was awarded RM21,553,000 as compensation. Kenny Heights then filed an objection with respect to the amount of the award and hence, the present land reference proceeding. However, before the land reference could be heard, SPRINT filed a summons in chambers applying to intervene in the land reference proceeding as a co-respondent under O. 15 r. 6(2)(b) of the Rules of the High Court 1980. SPRINT contended that there was a privatization agreement in existence between itself and the Government regarding the construction and maintenance of a highway and the collecting of tolls on the land in question. According to SPRINT, they were entitled to intervene because any increase in award of compensation to Kenny Heights that the court might make would have to be borne by SPRINT. Hence, it was argued that SPRINT'S legal interest would be directly affected. SPRINT did not tender the privatization agreement in its

entirety citing the confidentiality clause of the agreement which prohibited SPRINT from disclosing the entire agreement. The learned Deputy Registrar allowed the SPRINT's application. Kenny Heights appealed against this decision.

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Held (allowing the appeal with costs):

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(1) The learned Deputy Registrar had erred in law when she allowed SPRINT's application to intervene in the proceedings. SPRINT had failed to prove the existence of the contractual obligation and the existence of the privatisation agreement. The legal burden was on SPRINT to prove on a balance of probabilities that such a contractual obligation did exist. (paras 2 & 14)

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(2) SPRINT did not tender the agreement in its entirety but only tendered portions (containing selected clauses) of the agreement. The best evidence rule requires that the privatization agreement in its entirety be produced to court. Any provision of an agreement which a party is inviting the court to interpret cannot be construed in isolation: it must be construed in the context of the agreement as a whole. There was a serious doubt as to the validity of the privatization agreement. (para 14)

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(3) Under the confidentiality clause, the prohibition to disclose was not an absolute prohibition. The parties to the agreement may by mutual agreement disclose the agreement to a third party. When there is a request by a party to the agreement for disclosure to a third party, the other party to the agreement cannot withhold agreement to the request unreasonably. On the issue of confidentiality, parties must act rationally and reasonably. However, in the present case, SPRINT itself was not keen to tender the whole agreement to the court and therefore they must be prepared for the consequence of an adverse inference. (para 16)

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Obiter:

(1) There is nothing in the Highway Authority Malaysia (Incorporation) Act 1980 that enables LLM or the Government to privatize the functions of LLM (constructing and maintaining the highway and collecting tolls) to a private entity such as SPRINT. (para 7)

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Case(s) referred to:

Pegang Mining Company Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 (*refd*)
Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 SC (*refd*)

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purpose of the functions of the LLM. The Highway Authority Malaysia (or LLM) is a body corporate established under s. 2 of the Highway Authority Malaysia (Incorporation) Act 1980. The functions of the LLM are set out by s. 11 of the Highway Authority Act. Among the functions of the LLM are:

- (a) to supervise and execute the design, construction and maintenance of highways as determined by the Federal Government;
- (b) to supervise and execute the design, construction and maintenance of rest and service areas and other facilities that may be deemed necessary along highways as determined by the Federal Government;
- (c) to collect toll from the users of highways and other dues from facilities along highways;

[6] Under s. 22(1) of the Highway Authority Malaysia (Incorporation) Act 1980 it is provided:

General power to acquire land.

22.(1) Where any immovable property, not being State land or reserved land, is needed to be acquired for the purpose of this Act and cannot be acquired by agreement, such property may be acquired in accordance with the provisions of any written law relating to the acquisition of land for a public purpose for the time being in force in the State in which the property is situated and any declaration required under any such written law that the land is so needed may be made notwithstanding the compensation is to be paid out of the funds of the Authority, and the said declaration shall have effect as if it were a declaration that the land is needed for a public purpose made in accordance with the said written law.

- (2) Expenses and compensation in respect of any immovable property acquired under this section shall be paid by the authority.

[7] As the acquisition is pursuant to the Highway Authority Act read together with the Land Acquisition Act, I must here pause for a moment to point out that it is significant to note that there is nothing in the Highway Authority Act that enables LLM or the Government to privatize the functions of LLM (constructing and maintaining the highway and collecting tolls) to a private entity such as SPRINT. I am somewhat impelled to raise this point at this juncture for the reason that in spite of the fact that the Kenny Height's land was acquired for the purpose of LLM (this is a common agreed fact), yet there is the

- A** contention of SPRINT that there is a privatization agreement in existence between itself and the Government (curiously, although the acquisition of the land is meant for LLM, and LLM was paying the compensation to Kenny Heights, yet LLM is not a party to the alleged privatization agreement) regarding the construction and maintenance of a
- B** highway and the collecting of tolls on the very land that had been acquired for the purpose of LLM.

- [8]** Anyway, reverting to the acquisition process in the present case, in accordance with the provisions of the Land Acquisition Act, an inquiry was held by the Land Administrator; and Kenny Heights, at the
- C** conclusion of the inquiry, was awarded RM21,553,000 as compensation. The compensation was paid to Kenny Heights by LLM in accordance with s. 22(2) of the Highway Authority Act. Kenny Heights, dissatisfied with the award, and invoking s. 37 of the Land Acquisition Act, filed an objection with respect to the amount of the award. The Land
- D** Administrator accordingly as required by s. 38 of the Land Acquisition Act referred the objection to the High Court. Hence, the present land reference proceeding before me.

- [9]** However, before this land reference could be heard, SPRINT filed a summons in chambers applying to intervene in the land reference
- E** proceeding as a co-respondent. This application by SPRINT was made under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 which reads:

Misjoinder and non-joinder of parties.

- F** (1) ...
- (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
- G** (a) ...
- (b) Order any of the following persons to be added as a party, namely:
- H** (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
- I** (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the

Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

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but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

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[10] In the landmark Privy Council case of *Pegang Mining Company Ltd. v. Choong Sam & Ors* [1969] 2 MLJ 52 it was held that in order to be entitled to intervene in a proceeding the intending party must satisfy the court that the order that the court might make would directly affect his legal interest. (See also the Supreme Court case of *Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd.* [1992] 1 CLJ 344 (Rep) [1992] 2 CLJ 1153)

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[11] SPRINT contends that they are entitled to intervene because any increase in award of compensation to Kenny Heights that this court might make at the conclusion of this land reference proceeding would be borne by them (ie, SPRINT) by reason of a privatization agreement entered into between SPRINT and the Government. Hence, it is argued, SPRINT'S legal interest would be directly affected by any increase in award to Kenny Heights that this court might make at the conclusion of this proceeding.

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[12] In the supporting affidavit, it is averred by SPRINT that the SPRINT Highway project was privatized to them by the Government of Malaysia via a privatization (or concession) agreement. In other words, the Government confers on SPRINT the right to construct and maintain the highway and to collect tolls from the highway users. It is further averred that in the privatization (concession) agreement, entered into between SPRINT and the Government, SPRINT undertakes to bear the cost of any land acquired for the purpose of the highway project. This means that any compensation money that was paid out by LLM to Kenny Heights would come from SPRINT. In other words, according to SPRINT, LLM is merely a conduit to pass money from them to Kenny Heights.

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[13] In my judgment, on the supposition that there was a privatization agreement between SPRINT and the Government of Malaysia, I am unable to accept the argument advanced by the learned counsel for SPRINT that any order that I might make to increase the compensation payable to Kenny Heights would directly affect the legal interest of SPRINT by reason of the said privatization agreement. In my view, the effect on SPRINT, if the court were to increase the award in favour of Kenny Heights, would only be an indirect effect. This is because the compensation to Kenny Heights as a matter of law has to be paid by

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- A** LLM to Kenny Heights by virtue of s. 22(2) of the Highway Authority Act, and not by SPRINT. For sub-s. (2) says that the compensation 'shall be paid by the authority.' '[A]uthority' here means the LLM. Thus the party whose legal interest would be directly affected by any increase of the award, if at all made by this court, would be LLM and not SPRINT.
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[14] But in the first place, is the existence of such a contractual obligation on the part of SPRINT (the contractual obligation to pay the compensation to Kenny Heights) proven? In my view, SPRINT has failed to prove the existence of the contractual obligation. In fact SPRINT even fails to prove the existence of the privatisation agreement. It is my judgment that the legal burden is on SPRINT to prove on a balance of probabilities that such a contractual obligation does exist; since SPRINT is invoking O. 15 r. 6(2)(b) of the RHC. Now, SPRINT in its endeavour to prove the existence of such a contractual obligation seeks to tender in evidence the alleged privatisation agreement; but the problem is, SPRINT is not tendering the agreement in its entirety: SPRINT is only tendering portions (containing selected clauses) of the agreement. The best evidence rule, however, requires that the privatization agreement (or concession agreement) itself in its entirety be produced to court for the examination by the court. However in the present case, as I have just said, this has not been done. In my judgment, it is axiomatic that any provision of an agreement (for example a provision relating to the legal obligation on the part of SPRINT to pay compensation to a landowner whose land was acquired) which a party is inviting the court to interpret cannot be construed in isolation: it must be construed in the context of the agreement as a whole. Indeed it is all the more imperative in the present case where:

- (a) in the light of the provisions of ss. 3, 11 and 22 of the Highway Authority Act pertaining to the functions of LLM in relation to the design, construction and maintenance of highways;
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- (b) in the light of the purpose of the acquisition of the Kenny Heights' land (that is for the purpose of LLM - and not for the purpose of SPRINT);
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- (c) in the light of the duty imposed on LLM (and not on SPRINT) to make compensation to Kenny Heights; and
- (d) in the light of the absence of a provision in the Highway Authority Act conferring any right or power either on LLM or the Government to privatize the highway,
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there is, to my mind, a serious doubt as to the validity of the privatization agreement that SPRINT has made with the Government.

[15] The reason given by SPRINT for not tendering the privatization agreement in its entirety is because of the confidentiality clause of the agreement which prohibits SPRINT from disclosing the entire agreement. The confidentiality clause reads:

33.1 Confidentiality

This Agreement and all matters pertaining hereto shall be considered a confidential matter and shall not be disclosed to any third party without prior mutual agreement (which agreement shall not be unreasonably withheld) unless the same is required by law.

[16] However, it is pertinent to observe that under the above clause, firstly, the prohibition to disclose is not an absolute prohibition: the parties to the agreement may by mutual agreement disclose the agreement to a third party (say, for example, to the court). Secondly, when there is a request by a party to the agreement for disclosure to a third party (say, to the court), the other party to the agreement cannot withhold agreement to the request unreasonably. In other words, on the issue of confidentiality, parties must act rationally and reasonably. However, in the present case it would appear that SPRINT itself is not keen to tender the whole agreement to the court as shown by para. 2 of the letter from the Ministry of Public Works dated 8 June 2004 to SPRINT. For, by para. 2 of the said letter, it appears that SPRINT had requested from the Ministry permission to disclose only certain parts of the agreement to the court. Why was SPRINT selective? Why didn't SPRINT apply to the Ministry of Public Works for the disclosure of the entire agreement to the court? I fail to see any rational basis for SPRINT to assume that the Ministry would withhold its agreement to a full disclosure of the agreement to the court. Since SPRINT itself is not prepared to disclose the entire agreement then they must be prepared for the consequence of an adverse inference that this court will make.

Appeal allowed with costs.

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